

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROYAL YATES,	)	
	)	
Plaintiff(s),	)	No. C05-1510 BZ
	)	
v.	)	
	)	
GUNNALLEN FINANCIAL and CURT	)	<b>ORDER DENYING RULE 50 AND</b>
WILLIAMS,	)	<b>RULE 59 MOTIONS AND</b>
	)	<b>REMITTING PUNITIVE DAMAGES</b>
	)	
Defendant(s).	)	
_____	)	

The motions of defendants GunnAllen Financial ("GunnAllen") and Curt Williams for judgment as a matter of law pursuant to Rule 50(b) on the punitive damage claim or, in the alternative, for a new trial pursuant to Rule 59(a) on the issue of punitive damages are **DENIED** for the reasons given during oral argument and for the following reasons:

1. Defendants cannot now claim that the jury was inadequately instructed on certain punitive damage issues because the instructions given by the court were either instructions submitted by defendants or joint instructions to

1 which defendants had agreed. U.S. v. Baldwin, 987 F.2d 1432,  
2 1437 (9th Cir. 1993)("Where the defendant himself proposes the  
3 jury instruction he later challenges on appeal, we deny review  
4 under the invited error doctrine.").

5 2. The jury's award of punitive damages was not contrary  
6 to the weight of the evidence. McEuin v. Crown Equipment  
7 Corp., 328 F.3d 1028, 1036 (9th Cir. 2003)("Judgment as a  
8 matter of law is proper if the evidence, construed in the  
9 light most favorable to the nonmoving party, permits only one  
10 reasonable conclusion, and that conclusion is contrary to the  
11 jury's.")(internal quotations and citation omitted). Ample  
12 evidence supported the jury's award, including: (a) evidence  
13 of excessive trading or turnover in plaintiff's account which  
14 he testified that he did not authorize, (b) evidence of the  
15 substantial commissions earned by defendants in two months,  
16 more than half of the value of plaintiff's account at the  
17 inception of the "churning," (c) evidence that it would have  
18 been virtually impossible for plaintiff to earn a rate of  
19 return sufficient to offset the commissions charged, (d)  
20 evidence that defendants had never presented plaintiff with a  
21 commission schedule and that the statements that plaintiff  
22 received were formatted to make it very difficult to determine  
23 what commissions he was being charged and (e) evidence that  
24 following plaintiff's complaint, GunnAllen reviewed his  
25 account and concluded that there had been no impropriety, from  
26 which the jury could have concluded that whatever Williams  
27 did, it was not a personal lark but was consistent with  
28 GunnAllen's policies and practices and that Williams' conduct

1 had been ratified or approved by GunnAllen.

2 3. The fact that plaintiff is an experienced trader and  
3 did not object to the defendants characterizing him as an  
4 "aggressive" trader is beside the point. Jt. Pretrial Stmt.  
5 4:7-9 [doc # 30-1]. Plaintiff is not complaining that he was  
6 placed in an aggressive investment which he authorized or  
7 approved and which subsequently lost value; rather he  
8 presented evidence that defendants were churning his account  
9 to earn themselves commissions and not to earn him money.

10 4. Defendants did not help their case by not testifying.  
11 The only testimony from any GunnAllen employee was a few  
12 portions of the depositions of Renee Emerick and Emil Dimitrov  
13 introduced by plaintiff. The jury heard no percipient defense  
14 witness explain the strategy behind the substantial turnover  
15 in plaintiff's accounts on certain days.

16 5. The size of the jury's award, however, is excessive  
17 under the factors enumerated in State Farm Mutual Auto. Ins.  
18 Co. v. Campbell, 538 U.S. 408 (2003). "Whether an award  
19 comports with due process is measured by three guideposts:  
20 (1) the degree of reprehensibility of the defendant's  
21 misconduct; (2) the disparity between the actual or potential  
22 harm suffered by the plaintiff and the punitive damages award;  
23 and (3) the difference between the punitive damages awarded by  
24 the jury and the civil penalties authorized or imposed in  
25 comparable cases." Planned Parenthood of Columbia/Willamette  
26 Inc. v. American Coalition of Life Activists, 422 F.3d 949,  
27 953 (9th Cir. 2005). See also Bains LLC v. Arco Products Co.,  
28 405 F.3d 764, 775 (9th Cir. 2005).

1           6. The most important guidepost is the reprehensibility  
2 of defendants' conduct. State Farm, 538 U.S. at 419. Some of  
3 the factors which make a defendant's conduct reprehensible do  
4 not exist here. The harm to plaintiff was economic, not  
5 physical, and it did not endanger his health or safety.  
6 Plaintiff was not financially vulnerable and was not subject  
7 to the sorts of misrepresentations and inducements often found  
8 in other churning cases. See, e.g., Hatrock v. Edward D.  
9 Jones & Co., 750 F.2d 767 (9th Cir. 1984)(broker's misleading  
10 assurances of rumored takeover induced young couple to buy  
11 stock); Hobbs v. Bateman Eichler, Hill Richards, Inc., 164  
12 Cal.App.3d 174 (1985)(broker took advantage of widow with no  
13 previous investing experience). Plaintiff's compensatory  
14 damages, together with his prejudgment interest, have made him  
15 whole. See State Farm, 538 U.S. at 426. At the same time,  
16 churning an account for commissions is financially  
17 reprehensible and there was no evidence from either defendant  
18 explaining their conduct.

19           7. As to the second guidepost, against GunnAllen the  
20 jury awarded punitive damages of exactly six times  
21 compensatory damages. While this single digit ratio satisfies  
22 due process as determined by the Supreme Court in State Farm,  
23 538 U.S. at 425, it is higher than the ratio suggested by the  
24 Supreme Court and the Ninth Circuit for cases in which  
25 plaintiff has received substantial compensatory damages.  
26 "[A]n award of more than four times the amount of compensatory  
27 damages might be close to the line of constitutional  
28 impropriety." State Farm, 538 U.S. at 425; Planned

1 Parenthood, 422 F.3d at 962 (in cases which awarded plaintiff  
2 economic damages and defendant's behavior was not particularly  
3 egregious, "a ratio of up to 4 to 1 serves as a good proxy").  
4 The ratio of six to one is also just outside the high end of  
5 the range of punitive damage awards in other cases cited by  
6 plaintiff, all of which were decided several years before  
7 State Farm and BMW of North America, Inc. v. Gore, 517 U.S.  
8 559 (1996). See, e.g., Hatrock, 750 F.2d at 772 (upholding a  
9 punitive damage award of \$200,000 against the brokerage  
10 company following an award of \$37,000 in compensatory damages  
11 for a ratio of 5.4 to 1.0).

12 8. The third guidepost is not very helpful here. It  
13 does not appear that federal or state law authorizes civil  
14 penalties in churning cases. 15 U.S.C. § 78bb(a). A federal  
15 crime analogous to churning would be wire fraud, which is  
16 punishable by a fine of up to \$500,000 for an organization and  
17 up to \$250,000 for an individual. See 18 U.S.C. § 1343; 18  
18 U.S.C. § 3571(b) and (c).

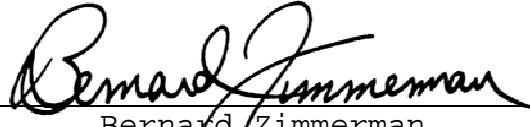
19 Having found the amount of the punitive damages to be  
20 excessive, I have two options.

21 When the court, after viewing the evidence  
22 concerning damages in a light most favorable to  
23 the prevailing party, determines that the  
24 damages award is excessive, it has two  
25 alternatives. It may grant defendant's motion  
for a new trial or deny the motion conditional  
upon the prevailing party accepting a  
remittitur.

26 Fenner v. Dependable Trucking Co., 716 F.2d 598, 603 (9th Cir.  
27 1983). Accordingly, **IT IS ORDERED** that defendants' Rule 50  
28 and Rule 59 motions are **DENIED** except that GunnAllen's motion

1 for a new trial pursuant to Rule 59(a) on the issue of the  
2 amount of punitive damages is **DENIED** on condition that  
3 plaintiff accept a remittitur of the amount of punitive  
4 damages to \$721,146, or three times the amount of compensatory  
5 damages. Plaintiff shall file an election to accept or reject  
6 the remittitur by **July 17, 2006**.

7 Dated: June 30, 2006

8   
9 Bernard Zimmerman  
United States Magistrate Judge

10 G:\BZALL\BZCASES\YATES 2\ORDER.DENY.51.59.MOTIONS.5.wpd  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28